MALAYSIAN REPORTS

United Malayan Banking Corp Bhd v Kek Tek Huat (deceased) (Kik Chon Lam & Ors, executors of the estate of Kek Tek Huat)

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 248 OF 1988
ABDUL HAMID LP, MOHAMED YUSOFF AND GUNN CHIT TUAN SCJJ
11 NOVEMBER 1989

Banking — Bank receiving cheques belonging to respondent — Crossed and marked 'not negotiable account payee only' — Cheques credited to account of another person after collection — Claim for damages for conversion and negligence — Defence that respondent had not provided consideration for the said cheques and that even if the respondent was the owner of the cheques he had negotiated them — Bills of Exchange Act 1949, ss 30(2) & 85(1)

In this case, the respondent, since deceased, had claimed that the appellant had received a number of his cheques issued by firms of stock and share brokers which were crossed and marked 'not negotiable account payee only'. It was alleged that the cheques were paid after collection to the account of another person. The respondent brought an action claiming damages for conversion and negligence. The appellant admitted that the said cheques were issued in the respondent's name but averred that the respondent had not provided any consideration for the said cheques. It also pleaded that even if the respondent was the owner of the cheques he had negotiated them. The trial judge held that the appellant was liable for damages for conversion and negligence. The appellant appealed.

Held, dismissing the appeal:

(1) The respondent was the true owner of the cheques and had a sufficient interest in them to enable him to bring an action for damages for conversion and negligence.

(2) In view of the learned judge's finding of negligence on the part of the appellant for which there was evidence adduced, the appellant as the collecting banker was not entitled to the protection of s 85 of the Bills of Exchange Act 1949.

(3) In view of the finding of fact by the learned judge that the endorsement on the cheques was not made by the respondent, it is clear that the respondent had not negotiated the cheques by endorsing them.

(4) As the acceptance or subsequent negotiation of the cheques in this case was affected by circumstances in the nature of fraud, the onus probandi was on the defence to show that subsequent to the alleged fraud the third person had given value in good faith for the said cheques. There was no such evidence adduced by the defence.

Cases referred to

1 *Rubber Industry (Replanting Board) v Hongkong and Shanghai Banking Corp* [1957] MLJ 103 (distd)
2 *Oriental Bank of Malaya v Rubber Industry (Replanting) Board* [1957] MLJ 153 (distd)
3 *Jebsen & Jessen (Singapore) Pte Ltd v Yeung Hoi Kwang* [1978] 2 MLJ 96 (refd)
4 *Smith v Union Bank of London* (1875) 1 QBD 31 (refd)
5 *Bute (Marquess) v Barclays Bank Ltd* [1955] 1 QB 202 (refd)

Legislation referred to

Bills of Exchange Act 1949 ss 30(2), 85(1)

Appeal from: Civil Suit No 291 of 1978 (High Court, Kuala Lumpur)

Mohamad Ismail Shariff (N Segara (Mrs) with him) for the defendant/appellant.

G Sri Ram for the plaintiff/respondent.

Cur Adv Vult

Gunn Chit Tuan SCJ (delivering the judgment of the court): The plaintiff, Kek Tek Huat, a businessman, passed away before the hearing of this suit and his executors were substituted as plaintiffs. In his statement of claim it was averred that the United Malayan Banking Corp Bhd, the defendant, had received a number of his cheques issued by GP Securities (Sdn), a firm of stock and share brokers. The cheques were crossed and marked 'not negotiable account payee only'. The plaintiff subsequently discovered that those cheques had been credited into the account of one Ong Swee Hock after they were collected by the Jalan Tun Perak Branch of the defendant from the banks concerned. The total number of cheques issued by GP Securities (Sdn) was 36 for a total sum of $347,885.96.

The plaintiff also discovered that 20 cheques issued to him by Syarikat Leong Sdn Bhd, another firm of stock and share brokers, had also been paid into the Jalan Tun Perak Branch of the defendant to the credit of the said Ong Swee Hock. The total sum of those cheques was $204,206.40. The plaintiff had averred that he was the true owner of those cheques, and has suffered losses amounting to altogether $550,092.50 which he claimed from the defendant as damages caused to him due to conversion of those cheques by the defendant or by the negligence of the defendant. Alternatively, he claimed that he had a right to the said amount from the defendant as money had and received by the defendant for his use.

The defendant in its statement of defence admitted that the said cheques were issued in the plaintiff's name but averred that the plaintiff had not provided any consideration for the said cheques. It also pleaded that even if the plaintiff was the owner of the cheques he had negotiated them, and denied that the said cheques were crossed in the manner as prescribed by law or at all. The defendant also averred that all the cheques that were paid into the credit of the account of Ong Swee Hock were done so with the express and or implied authorization of the plaintiff who had endorsed and negotiated the said cheques to enable the said Ong Swee Hock to deal with them.

After considering the evidence adduced by both parties and the submissions of counsel, the learned judge found that the defendant was liable for damages for conversion and also for negligence. He therefore ordered the defendant to pay the substituted plaintiffs the sum of $552,092.30 together with interest thereon at the rate of 8% pa from the date of filing this action to date of realization and costs. The defendant appealed to the Supreme Court against the whole of the said decision.

Before us, Encik Mohd Ismail Shariff, leading counsel who appeared for the defendant on appeal, stated that the defence was that the plaintiff was not the 'true owner' of the said cheques and had not provided any consideration for them. He contended that, moreover, those cheques had been negotiated by the plaintiff to Ong Swee Hock. Counsel then referred to the following s 85(1) of the Bills of Exchange Act 1949 ('the Act'):

> Where a banker, in good faith and without negligence
>
> (a) receives payment for a customer of an instrument to which this section applies; or
> (b) having credited a customer's account with the amount of such an instrument, receives payment thereof for himself;
>
> and the customer has no title, or a defective title, to the instrument, the banker does not incur any liability to the true owner of the instrument by reason only of having received payment thereof.

and contended that the plaintiff was not the true owner within the meaning of that sub-s (1). He also referred to the following paragraph on the meaning of 'the true owner' at p 198 of Paget's *Law of Banking* (9th Ed):

> The true owner of a cheque must be the party with an unassailable title to it whether in possession of it or not, for the reason that a cheque is a negotiable instrument. ...
>
> At the time the cheque is issued either the drawer or the payee is the true owner, the payee if he has not come by the cheque fraudulently and the drawer if the payee has been fraudulent;

and contended that only GP Securities (Sdn) and Leong Sdn Bhd were the owners of the cheques in question. He also referred to a letter written to the defendant by the former solicitor of the plaintiff appearing at p 291 of Part C of the appeal records wherein the solicitor had stated that: 'A number of cheques issued by Messrs GP Securities (Sdn), Kuala Lumpur, on you and some other banks in Kuala Lumpur in favour of my said client Mr Kek Tek Huat have not been received by him.'

Counsel then referred to *Rubber Industry (Replanting) Board* v *Hongkong and Shanghai Banking Corp*[1] in which case the plaintiffs had issued a cheque in favour of one Toh Whye Teck in the sum of $6,762.33 and the cheque was marked 'Account payee only'. In some way unknown to the plaintiffs the cheque came into the possession of some unauthorized person. Subsequently one Lee Man Choi opened an account with the defendant bank in the name of Chop Toh Waye Teck and the cheque in favour of Toh Whye Teck was paid into this account. The plaintiffs claimed damages. Buhagiar J (as he then was) held, firstly, that in the circumstances of that case there had been no delivery of the cheque to the payee and therefore the plaintiffs remained the true owners and were entitled to maintain the action; and he also held, secondly, that the defendant bank had not discharged the onus of proving that they have acted without negligence and were not entitled to the protection of s 82 of the Bills of Exchange Ordinance 1949, and were liable to the plaintiffs for damages for conversion of the cheque.

Counsel then pointed out that the expression 'issue' in s 2 of the Act means 'the first delivery of a bill or note, complete in form, to a person who takes it as a holder', and he also pointed out that the expression 'delivery' means 'transfer of possession, actual or constructive, from one person to another'. Reference was also made by him to the following para 6-50 of *The Law and Practice of Banking* (4th Ed) Vol 1 by JM Holden:

> It is not always easy to decide whether or not a prospective plaintiff has a sufficient interest in chattels, including cheques, to enable him to bring an action for damages for conversion. The reported cases seem to show that a plaintiff can maintain an action for conversion if, at the time of the defendant's act, he had (1) ownership and possession of the goods, or (2) possession of them, or (3) an immediate right to possess them, but without either ownership or actual possession: but in this third case he will lose his action if the defendant proves that the title to the goods is in some third party.

Counsel also referred to p 329 of *Byles on Bills of Exchange* (26th Ed) where the learned author has stated that: 'The payee of a bill is the first true owner, once it is delivered to him either actually or constructively.' Encik Mohd Ismail Shariff stated that in this case there was no actual delivery nor was there any finding by the learned judge that there had been constructive delivery of the said cheques.

The Court of Appeal case of *Oriental Bank of Malaya* v *Rubber Industry (Replanting) Board*[2] was also referred to by Encik Mohd Ismail Shariff. In that case, the respondents had issued a cheque in favour of Kok Ann Rubber Estate in the sum of $14,730.89 and the cheque was marked 'account payee only'. In some way unknown to the respondents the cheque came into the possession of some unauthorized person. Subsequently, one Lee Man Chooi opened an account with the appellants in the name of Kok Ann Rubber Estate, of which he claimed to be the sole proprietor. The account was opened with the said cheque for $14,730.89. The respondent claimed damages. At the trial Buhagiar J (as he then was) again held that (i) in the circumstances of the case there had been no delivery of the cheque to the payee and therefore the plaintiffs/respondents remained the true owners and were entitled to maintain the action; (ii) Lee was a customer of the defendant/appellant banker, and therefore the bank could claim the protection of s 82 of the Bills of Exchange Ordinance

1949; and (iii) the defendant/appellant bank had not discharged the onus of proving that they have acted without negligence and were therefore liable to the plaintiffs/respondents for damages for conversion of the cheques. The defendant appealed and on appeal it was argued that the respondents had no cause of action in that, at the date of the conversion of the cheque they were not the true owners of the cheque, nor entitled to the immediate possession thereof. The former Court of Appeal held that the respondents were entitled to maintain an action for conversion of the cheque.

The next line of argument of the defendant was that even if there had been delivery of the said cheques to the plaintiff, the said Ong Swee Hock was a holder in due course within the meaning of the following s 30(2) of the said Act:

> Every holder of a bill is prima facie deemed to be a holder in due course; but in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill.

We understood counsel's contention as that the plaintiff should have pleaded and proved that there was an absence of valuable consideration provided by the said Ong Swee Hock. He relied on the case of *Jebsen & Jessen (Singapore) Pte Ltd* v *Yueng Hoi Kwang*.[3] In that case the plaintiffs were the holders of a cheque issued by the defendants and made payable to cash or bearer. The cheque was dishonoured and the plaintiffs sued the defendants for the full amount of the cheque. The defence was that the cheque was given to one Simon Yoong, the plaintiffs' agent, for delivery to the plaintiffs and post-dated as payment for white gold. The white gold was not delivered and, as admitted by him in evidence, was misappropriated by Simon Yoong. As the plaintiffs had failed to deliver the goods the defendants alleged that he was discharged from any liability on the said cheque for want of consideration. It was held by Kulasekaram J of the Singapore High Court that at the outset, the onus was on the defendants to show that the plaintiffs were not holders in due course. Secondly, on the evidence the issue of the cheque was clearly affected by fraud and that being so the onus was on the plaintiffs to prove that value had been given for the cheque. The onus was shifted to the plaintiffs to show that they had delivered the goods to the defendants and on the evidence that onus had not been discharged, and the action was dismissed.

Reference was also made to the English Court of Appeal case of *Smith* v *Union Bank of London*.[4] In that case, the plaintiff had endorsed his name on the cheque which was stolen and passed for full value to C. It was held that the relevant English statute did not affect the negotiability of the cheque and that C had become a bona fide holder of it before it was presented to the defendants and the plaintiff was not the holder and had no right of action against the defendants. It was the contention of Encik Mohd Ismail Shariff that the negotiability of the cheques in this case was also not affected because of the endorsement of the cheques concerned by the plaintiff, and the said Ong Swee Hock had become a holder in due course before he paid them into his account with the defendant.

Mr Sri Ram, counsel for the plaintiff, pointed out that in a written submission filed in the court below, the defence had stated that 'the witnesses for the two stock broking firms had said that when the scripts were handed in, the deliveror was handed a slip which was later exchanged for a cheque. It was not possible that the deceased did not know promptly that payment would have been made to him and that cheques had been handed over to his delivery boy.' Counsel said that the stand taken by the defence in the court below was that there was delivery of the cheques to the plaintiff and he was surprised that it was contended before the Supreme Court that there had been no delivery of the cheques to the plaintiff.

Counsel also referred to *Banking Law Leading Indian Cases* (2nd Ed) by MS Parthasarathy in which the learned author had pointed out that: 'Whether the drawer (of a cheque) is the true owner or not depends upon the facts of each case.' He then referred to *Bute (Marquess)* v *Barclays Bank Ltd*[5] at p 211 in which case it was held by McNair J that in order to claim in conversion it was not necessary for the plaintiff to establish that he was the true owner of the property alleged to have been converted, but that it was sufficient if he could prove that at the time of the conversion he was entitled to immediate possession. Mr Sri Ram also referred to para (a) of the particulars of para 8 of the statement of defence in which the defendant had stated that:

> The plaintiff after having received all the cheques from the said Messrs GP Securities (Sdn) and the said Messrs Leong & Co Sdn allowed the said Ong Swee Hock to deal with all the various cheques after the plaintiff has made endorsements to all the said cheques.

Counsel contended that the defendant had all along admitted that the plaintiff had received all the cheques and therefore the question of the delivery of those cheques was not an issue and the plaintiff was therefore the true owner of the cheques in question.

It should be noticed that in both the cases of *Rubber Industry (Replanting) Board* v *Hongkong and Shanghai Banking Corp*[1] and the *Oriental Bank of Malaya* v *Rubber Industry (Replanting) Board*[2] it was held by the court that the drawer of the cheques concerned, namely, the Rubber Industry (Replanting Board), remained the true owner of the cheques and was entitled to maintain the action for conversion of the cheques. The court was not concerned in both cases with the question whether the payee of the cheques was the true owner and could maintain an action

for conversion. In any case it should also be noticed that Buhagiar J in *Rubber Industry (Replanting) Board* v *Hongkong and Shanghai Banking Corp*[1] had pointed out that 'there are several cases where an action has been successfully maintained by the payee who never was in actual possession of a cheque or other instrument because although such cheque or instrument was despatched it never reached the payee, eg *Commissioner of Taxation* v *English, Scottish and Australian Bank Ltd* [1965] 1 Lloyd's Rep 525; *Norman* v *Ricketts* (1886-7) 3 TLR 182; *Thairlwall* v *The Great Northern Ry Co* [1910] 2 KB 509'.

In the circumstances of this case we agreed with Mr Sri Ram that the question whether there had been delivery of the cheques did not arise in view of what has been pleaded in the statement of defence and the submission of defence counsel in the court below. Encik Mohd Ismail Shariff informed us that he did not appear for the defendant in the court below but he might have noticed that the learned judge in his judgment, which was written in Bahasa Malaysia, did point out that it was clear that the plaintiff was the owner of the cheques concerned or at least had a right to the immediate possession because the defendant himself admitted that the cheques were issued by GP Securities (Sdn) and Syarikat Leong Sdn Bhd for and in the plaintiff's name as the payee and who was meant to have the proceeds and not others. Therefore, apart from the pleadings and the submission of the defence in the court below, there was the finding of the learned judge that the plaintiff had an immediate right to possess the cheques in question. We were therefore of the view that the plaintiff in this case was the true owner of the cheques and had a sufficient interest in them to enable him to bring an action for damages for conversion or for negligence. He was the true owner and had an immediate right of possession of the cheques for which there was evidence that he had provided consideration, ie by delivery of his scripts to the two firms of stock brokers in exchange for the cheques. We would also point out that in view of the learned judge's finding of negligence on the part of the defendant for which there was evidence adduced, the defendant as the collecting banker was not entitled to the protection of s 85 of the Act.

As regards the other lines of argument advanced by the defence, we note that the learned judge in his judgment had referred to the evidence of the plaintiff's daughter (PW8) who said that the signatures on the cheques in question were not those of her father. She said that she had often seen her father writing his signature on cheques and that her father had never made endorsements on the back of the cheques paid to him because he usually used his rubber stamp. The plaintiff had tendered exhibits showing his specimen signatures and the learned judge has also stated in his judgment that he had the opportunity of comparing the signatures on all the 56 cheques concerned with the plaintiff's specimen signatures on the exhibits produced (exhs P3, P6 and P7) and he had found as a fact that there was a vast difference between the signatures on the alleged endorsements and the specimen signatures of the plaintiff. He had therefore also found that the signatures on the back of the 56 cheques were not those of the plaintiff. In view of that finding of fact by the learned judge that the endorsement on the cheques was not made by the plaintiff, it was clear that the plaintiff had not negotiated the cheques by endorsing them. As the acceptance or subsequent negotiation of the cheques in this case was affected by circumstances in the nature of fraud, the onus probandi was on the defence to show that subsequent to the alleged fraud the said Ong Swee Hock had given value in good faith for the said cheques. There was no such evidence adduced by the defence.

As there were no merits in the appeal, we therefore dismissed it with costs and ordered that the deposit be paid to the respondent on account of taxed costs.

Appeal dismissed.

Solicitors: *Zain & Co; Jagjit Singh & Co.*

Reported by *Prof Ahmad Ibrahim*

Eeswari Visuvalingam v Government of Malaysia

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 500 OF 1988
ABDUL HAMID LP, HASHIM YEOP A SANI CJ (MALAYA), LEE HUN HOE CJ (BORNEO), MOHAMED AZMI AND MOHAMED YUSOFF SCJJ
7 NOVEMBER 1989

Public Servants — Pensions — Husband married wife according to Hindu rites — Husband subsequently embraced Islam — Wife remained a Hindu — No application for divorce made by the wife — Husband a pensioner who later died — Whether wife a widow and dependant and entitled to derivative pension — Pensions Regulations 1980, reg 2 — Pensions Adjustment (Amendment) Act 1983, s 4 — Pensions Act 1980, s 15

In this case the appellant sought a declaration that she was a dependant as defined in s 4 of the Pensions Adjustment (Amendment) Act 1983 and also a declaration that she was entitled to a derivative pension under s 15 of the Pensions Act 1980. The appellant was married according to Hindu rites and the marriage was registered. Her husband subsequently embraced Islam. He was a pensioner under the Pensions Act 1980 and later died. The appellant had not sought a divorce from him under the Law Reform (Marriage and Divorce Act) 1976. The High Court held that the appellant was not entitled to the derivative pension. The appellant appealed.

Held, allowing the appeal:

Section 15(1)(a) of the Pensions Act 1980 provides for derivative pension to be given to persons prescribed in the Pensions Regulations 1980. As the appellant came within the definition of 'widow' in the Pensions Regulations 1980 as 'being the surviving